

No. 91-1128

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

MERRETT UNDERWRITING AGENCY MANAGEMENT
LIMITED, *et al.*,

Petitioners

v.

STATE OF CALIFORNIA, *et al.*

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR THE GOVERNMENT OF THE
UNITED KINGDOM OF GREAT BRITAIN AND
NORTHERN IRELAND AS AMICUS CURIAE
IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Did the court of appeals properly assess the extra-territorial reach of the U.S. antitrust laws in light of this Court's teachings and contemporary understanding of international law when it held that a U.S. district court may apply U.S. law to the conduct of a foreign insurance market regulated abroad?

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IN SUPPORT OF PETITIONERS**

Having obtained the written consent of the parties pursuant to Rule 37.2 of the Rules of this Court,¹ the Government of the United Kingdom of Great Britain and Northern Ireland ("British Government") submits this brief as *amicus curiae* in support of the Petitioners in No. 91-1128.

¹ The letters of consent have been filed with the Clerk of this Court.

**INTEREST OF THE GOVERNMENT OF THE
UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND**

The British Government has a substantial interest in expressing to the Court its views with respect to this proceeding. The direct focus of the three claims under the U.S. antitrust laws to which the Petitioners' brief and this *amicus* brief pertain is business activity by British citizens within the London reinsurance and retrocessional insurance markets. Moreover, the Respondents' requested relief contemplates injunctions restricting certain conduct in London by the British defendants and, where applicable, their U.S. parents, as well as treble damages.

It is undisputed that British legislation contains extensive provisions regulating the conduct of this same British insurance business. As the district court correctly pointed out, the subject of the three antitrust claims at issue exists "in a regulatory and competitive framework established by the British Government." A 72,² 723 F. Supp. 464, 488 (N.D. Cal. 1989). The court of appeals, like the district court, acknowledged that, therefore, application of the U.S. antitrust laws to the London reinsurance market based on the claims at issue here would lead to significant conflict with English law and policy. A 29, 938 F.2d 919, 933 (9th Cir. 1991). Nonetheless, the court of appeals concluded that the requisite effects on U.S. commerce existed and that comity did not require abstention from the exercise of jurisdiction over the claims.

It has long been the policy of the British Government to cooperate with the U.S. Government and the U.S. courts in civil and commercial matters involving conduct deemed to be improper under the laws of both countries.

² All citations are to the Appendix to the Petition for a Writ of Certiorari.

Unfortunately, however, the assertion of certain claims of extraterritorial jurisdiction in antitrust proceedings in the United States has, from time to time, given rise to significant disagreements between U.S. antitrust claimants, on the one hand, and the British authorities, on the other.

British courts have recognized that British subjects who violate U.S. antitrust laws in certain circumstances may be subject to the jurisdiction of U.S. courts. However, British courts have taken the position that they should "insist on keeping the United States statutory provisions of the Sherman and Clayton Acts within the territorial jurisdiction of the United States in accordance with accepted standards of international law." *Midland Bank PLC v. Laker Airways Ltd.*, [1986] 2 W.L.R. 707, 726 (C.A.) (Dillon, L.J.).

The firm opposition of the British Government to such extraterritorial exercises of jurisdiction was manifested in the enactment by Parliament in 1980 of the Protection of Trading Interests Act.³ When submitting the Protection of Trading Interests Bill to the British Parliament, the then-Secretary of State for Trade stated that the objective of the Bill was

to reassert and reinforce the defences of the United Kingdom against attempts by other countries to enforce their economic and commercial policies unilaterally on us. From our point of view, the most objectionable method by which this is done is by the extraterritorial application of domestic law.

* * * *

[T]he practices to which successive United Kingdom Governments have taken exception have arisen in the case of the United States of America. We have not suddenly become belligerent or confrontational in regard to this most powerful and valued friend. The

³ 1980, ch. 11 (Eng.).

Bill is a response to a situation of a very particular nature which has been developing over several decades and which in the past few years has become more acute.⁴

This law, *inter alia*, prohibits enforcement by U.K. courts of certain foreign judgments involving the award of multiple damages and, in certain circumstances, entitles British citizens and businesses against whom foreign courts have awarded multiple damages to recover the noncompensatory element of the judgment from the plaintiff through an action in a U.K. court.⁵ Its enactment demonstrates the profound interest which the British Government has in cases like the instant proceeding.

In 1978, the Department of State, at the suggestion of the Clerk of this Court,⁶ encouraged foreign governments to present their views with regard to pending judicial proceedings directly to the U.S. courts.⁷ Since then, friendly foreign governments have relied on the State Department's position and have submitted briefs *amicus curiae* in this and other relevant U.S. courts.

⁴ Comments of the Secretary of State for Trade, 973 Parl. Deb., H.C. (5th ser.) 1533 (1979).

⁵ The Protection of Trading Interests Act 1980 and Exchange of Diplomatic Notes Concerning the Act, 21 I.L.M. 834 (1982); see also, e.g., A.V. Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 Am. J. Int'l L. 257 (1981).

⁶ Letter from Solicitor General McCree to Legal Adviser Hansell (May 2, 1978), reprinted in U.S. Dep't of State, 1978 *Digest of United States Practice in International Law* 560, reprinted in part in 73 Am. J. Int'l L. 122, 125 (1979).

⁷ Department of State Circular Diplomatic Note to Chiefs of Mission in Washington, D.C. (Aug. 17, 1978), reprinted in U.S. Dep't. of State, 1978 *Digest of United States Practice in International Law* 560, reprinted in part in 73 Am. J. Int'l L. 122, 124 (1979). See also Letter from Deputy Legal Adviser Marks (June 15, 1979), described in 73 Am. J. Int'l L. 669, 678-79 (1979).

This *amicus* brief is submitted to inform this Court of the British Government's views and to support the Petitioners' request for reversal of the court of appeals' decision. It is the essence of the British Government's position that the conduct of the British industry in the London reinsurance market is for the British Government to regulate. Therefore, the decision of the court below constitutes an interference with the sovereign rights and interests of the British Government. That decision is, with all due respect to the court below, erroneous and damaging to the principles of international law and comity to which this Court has accorded great significance in the past.

STATEMENT OF THE CASE

The complete background of this proceeding has been briefed by the parties. This *amicus* brief addresses solely the jurisdictional issues relevant to the British defendants which are raised in the brief filed on behalf of Petitioners in No. 91-1128.

As the district court observed, the following allegations of the complaints in these antitrust cases are relevant to activity by British citizens in the United Kingdom:⁸ The Fifth Claim alleges that the defendant London reinsurers agreed to restrict the terms on which reinsurance would be written and to refuse to reinsure certain risks. The Sixth Claim alleges that, at a meeting in London, the British defendants agreed that all North American casualty reinsurance treaties would be written with a pollution exclusion. The Eighth Claim alleges that in 1987 a group of London retrocessional reinsurers agreed to boycott retrocessional reinsurance treaties that

⁸ The Fifth, Sixth and Eighth claims described in the text refer to the "California-style" complaints. The comparable claims are the Third, Fourth and Fifth claims of the "Connecticut-style" complaints. *Amicus'* statements apply as well to the corresponding claims in other complaints including those brought by private plaintiffs.

included certain North American property risks unless the original insurance contained certain exclusions. A 65-67, 723 F. Supp. at 484-85.⁹

Relying on the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (1988) ("FTAIA"), the district court held that the challenged foreign conduct of the British defendants was subject to jurisdiction under the FTAIA because plaintiffs adequately alleged that:

a decision not to provide reinsurance or retrocessional reinsurance to cover certain types of risks in the United States has a direct effect on the availability of primary insurance in the United States.

A 70, 723 F. Supp. at 486.

However, applying the three-part test laid down by the Ninth Circuit in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 613-14 (9th Cir. 1976) ("*Timberlane I*"), after remand 749 F.2d 1378, 1382-83 (9th Cir. 1984) ("*Timberlane II*"), cert. denied, 472 U.S. 1032 (1985), the district court concluded that, upon consideration of the international comity factor of the test, extraterritorial jurisdiction should not be asserted. The court pointed out that the longstanding practices in the London reinsurance market challenged by the complaints were "openly conducted in conformity with English law" and were "directed primarily at reducing [the British defendants'] exposure to certain risks and controlling losses, a legitimate business purpose." A 73, 76, 723 F. Supp. at 488, 490.

The district court reasoned that:

[E]nforcement of the antitrust laws against activities in the London reinsurance market would lead to

⁹ A separate count in the complaint alleging that all defendants participated in a single "global" conspiracy was dismissed by the district court. A 65, 723 F. Supp. at 484. That dismissal was affirmed by the court of appeals, which directed that on remand plaintiffs should be afforded the opportunity to amend their complaint. A 26-27, 938 F.2d at 931.

significant conflict with English law and policy. This conflict, unless outweighed by other factors in the comity analysis, is itself a sufficient reason to decline exercise of jurisdiction. *Timberlane II*, 749 F.2d at 1384.

* * *

The foregoing analysis leads to the conclusion that the conflict with English law and policy which would result from the extraterritorial application of the antitrust laws in this case is not outweighed by other factors. Although the conduct complained of had effects within the United States, it is not alleged to have excluded competitors from markets or denied consumers access to markets, and it is not alleged to have occurred for that purpose.

A 75, 77-78, 723 F. Supp. at 489-90.

Accordingly, the district court dismissed these claims against the British defendants for lack of subject matter jurisdiction.

On plaintiffs' appeal, a panel of the court of appeals affirmed the district court's holding that the alleged effects in the United States were sufficient under the FTAIA, A 27, 938 F.2d at 932, but reversed the district court's ruling that there should be a dismissal on the basis of international comity.¹⁰ In assessing whether comity should be deemed to preclude exercise by the U.S. courts of subject matter jurisdiction over the aforementioned Fifth, Sixth and Eighth claims, the panel opinion reasoned that the enactment of the FTAIA had a profound effect on the *Timberlane* comity test, as follows:

... We do not believe a *Timberlane* analysis (see *infra*) can be unaffected by the statute. If a complaint survives the new bar of 15 U.S.C. § 6a because

¹⁰ The British Government filed in the court below an *amicus curiae* brief, as well as a brief in support of the London reinsurer defendants' petition for rehearing and suggestion for rehearing en banc.

the conduct has "a direct, substantial, and reasonable [sic] foreseeable effect" on American commerce, it is only in an unusual case that comity will require abstention from the exercise of jurisdiction. But as the legislation does not eliminate comity, a court should look to see if the case before it is one in which comity still has a role to play.

A 28, 938 F.2d at 932.

The opinion then conducted an evaluation of the *Timberlane* factors and, as to the "degree of conflict with foreign law or policy," determined:

The district court found that application of the antitrust laws to the London reinsurance market "would lead to significant conflict with English law and policy. . . ." The British [*amicus curiae*] brief reiterates that conclusion; we do not doubt its accuracy. Such a conflict, unless outweighed by other factors, would by itself be reason to decline exercise of jurisdiction. *Timberlane Lumber Co. v. Bank of America*, 749 F.2d 1378, 1384 (9th Cir. 1984) (*Timberlane II*), cert. denied, 472 U.S. 1032 (1985).

A 29, 938 F.2d at 933.

However, after evaluating five of the six other factors of the *Timberlane* test, the panel concluded that the only consideration pointing toward abstention was the conflict with British policy and that this was insufficient to overcome "the weight of the findings already made under the Foreign Trade Antitrust Improvements Act."¹¹ A 31, 938 F.2d at 934.

¹¹ Without explanation, the panel did not consider the seventh *Timberlane I* factor, i.e., "the relative importance to the violations charged of conduct within the United States as compared with conduct abroad." 549 F.2d at 614. This factor favors non-assertion of U.S. jurisdiction. See text *infra* at 26.

SUMMARY OF ARGUMENT

This case raises important questions relating to mutual respect between close allies and deference to principles of international law and comity. The decision of the court of appeals ignores those principles and the weight which this Court has attached to them in numerous opinions. The British Government urges the Court to reverse the decision below. It asks the Court to rule that, consistent with the demands of international law and comity, the U.S. courts should not exercise subject matter jurisdiction over those antitrust claims in this case which are directed against business activity being conducted in London by the British insurance and reinsurance industry for a legitimate business purpose in a manner consistent with the British Government's regulatory and competition regime.

Companies carrying on insurance business in the United Kingdom must be authorized by and operate under the supervision of the Department of Trade and Industry. The conduct of insurance business in the United Kingdom is also subject to U.K. and European Community ("E.C.") competition laws. A conflict arises in this case because Respondents ask the U.S. courts to impose substantial liability and restrictions on the British industry which is operating under the British regulatory and competition regime.

Dismissal of the Respondents' claims is required as a matter of both international and U.S. law. The FTAIA should not be construed as reflecting an intention by the Congress indiscriminately to apply U.S. antitrust law extraterritorially against business conduct engaged in by foreign nationals entirely outside of the United States for a legitimate business purpose. This Court has long held that federal statutes should not be construed to violate international law if any other possible construction remains, and the Court has also recently

reiterated the principle that legislation of Congress, unless a contrary intention appears, is meant to apply only within the territorial jurisdiction of the U.S. Moreover, even assuming that the FTAIA technically confers jurisdiction on the U.S. courts in a case like the present one, the court of appeals erred in that it did not hold that, because of considerations of international comity, such extraterritorial jurisdiction should not be exercised.

ARGUMENT

I. THE DECISION OF THE COURT BELOW DISREGARDS THE BRITISH GOVERNMENT'S REGULATION OF THE LONDON REINSURANCE MARKET AND AUTHORIZES AN EXERCISE OF U.S. JURISDICTION THAT SEVERELY CONFLICTS WITH BRITISH LAW AND POLICY

As both of the courts below recognized, the London reinsurance and retrocessional insurance businesses are carried on in a framework established by the British Government. Indeed, the United Kingdom has a long-standing, sophisticated system of insurance regulation. The degree and level of insurance and competition regulation in the United Kingdom have, of course, been the result of carefully assessed policy considerations over the years. The relevant legislation contains extensive provisions regulating the carrying on of the insurance business. In particular, the Insurance Companies Act, 1982,¹² requires that, with certain exceptions, all companies wishing to carry on insurance business in the United Kingdom must be authorized by the Department of Trade and Industry and are subject to continued supervision by that Department. Companies must have adequate initial capital and be managed by fit and proper persons. All authorized insurance companies are required to make regular financial filings to the Department of Trade and

¹² 1982, ch. 50 (Eng.).

Industry. It is recognized in the legislation that the requirement of a minimum solvency margin cannot by itself secure the financial stability of any insurer and that it is incumbent on the insurer itself to adopt a prudent approach to its underwriting, notably by ensuring that it does not take on unreasonable or unpredictable risks. However, the legislation confers upon the Department wide powers of intervention where it appears that any activities undertaken by an insurer would prejudice the interests of its policyholders. The filings with the Department of Trade and Industry must show that the companies meet the minimum margin of solvency as laid down in the E.C. Life and Non-Life Insurance Establishment Directives and that they have reserves adequate to cover their expected liabilities. Although those E.C. Directives only cover direct insurance, the U.K. has applied them to reinsurance under the Insurance Companies Act, 1982.

That Act also contains provisions relating to the conduct of insurance business by members of the Society of Lloyd's, the detailed regulation of which is governed by the Lloyd's Acts, 1871-1982,¹³ and the bylaws enacted by the Council of Lloyd's pursuant to authority delegated to it by those Acts. The governing principle of the British Government's regulation of Lloyd's is that of self-regulation within the Lloyd's market, subject, of course, to the general laws as set out above. As with the companies, Lloyd's members and syndicates are required to meet solvency standards and to file evidence of their compliance with those standards with the Department of Trade and Industry. If these requirements are not met, then the members must cease underwriting.

The conduct of insurance business is subject to investigation under U.K. competition laws. It may be investigated under the Fair Trading Act, 1973,¹⁴ and the

¹³ 1982, ch. 14 (Eng.).

¹⁴ 1973, ch. 41 (Eng.).

Competition Act, 1980.¹⁵ These laws provide for the reference and investigation of practices following which, if there are findings adverse to the public interest, the Secretary of State has powers to make remedial orders.¹⁶ In appropriate circumstances, European Community competition law may also be applicable, such as Article 85 of the Treaty of Rome relating to agreements and concerted practices restricting or distorting competition within the common market.¹⁷ The E.C. Merger Control Regulation may also be applicable.¹⁸ Mergers of insurance companies are subject to the merger control rules in the Fair Trading Act. In addition, any change of control of an authorized insurance company requires the approval of the Secretary of State under the Insurance Companies Act, 1982.

As does the United States, the United Kingdom has certain competition law exemptions for insurance. The district court referred to the exemption from the Restrictive Trade Practices Act, 1976,¹⁹ given to certain (but not all) agreements relating to insurance services by the Restrictive Trade Practices (Services) Order 1976.²⁰ A 73, 723 F. Supp. at 488. Moreover, the U.K. authorities keep their competition policies under review. The Conservative Party included in its last election manifesto a commitment to "tackle all anticompetitive and restrictive

¹⁵ 1980, ch. 21 (Eng.).

¹⁶ Under the Competition Act there is also the possibility of the Director General of Fair Trading obtaining remedial undertakings from the companies concerned. Under the Fair Trading Act such undertakings may be given to the Minister.

¹⁷ Treaty of Rome, 1957, art. 85, 298 U.N.T.S. 11.

¹⁸ Council Regulation (EEC) 4064/89, 1989 O.J. (L 395) 1.

¹⁹ 1976, ch. 34 (Eng.). The 1976 Act consolidated earlier enactments relating to restrictive trade practices.

²⁰ S.I. 1976, No. 98.

practices with vigour. We will introduce new legislation giving stronger powers to deal with cartels."²¹

Given this framework and the British Government's obvious legitimate interest in the stability and reliability of the insurance and reinsurance market in its territory, the conflict in this case arises because Respondents ask the U.S. courts to place restrictions on the British industry which is operating under the British regulatory and competition regime and also to subject British nationals to substantial legal liability for conduct in London which the district court properly found was "conducted in conformity with English law . . . [for] a legitimate business purpose." A 73, 76, 723 F. Supp. at 488, 490. The court of appeals itself accepted the district court's finding that the conduct had a "legitimate business purpose" and noted the existence of the conflict. A 29, 938 F.2d at 933-34.

The British scheme of regulation, including its competition policy aspects, has its origins in the history of the British insurance industry and of British competition policy, and the way in which the British Parliament has thought fit to legislate on both aspects over the years. It is for authorities responsible for the law in the United Kingdom, in the light of developments, *e.g.*, in the U.K. insurance industry, to decide whether to change the system. Some changes flow from British membership in the European Community. That is quite different from the order of a U.S. court applying extraterritorially U.S. legislation in whose formulation the British Government played no part, and to whose jurisdiction it has not assented. It would be inappropriate for the U.S. courts to take such action.

The U.S. Government has chosen a regulatory regime for the insurance business that involves substantial con-

²¹ The British Government published a White Paper in July 1989, *Opening Markets: New Policy on Restrictive Trade Practices*.

trol by state governments and an exemption from the federal antitrust laws. An assertion by an English court of a right to substitute its own regulatory structure in relation to portions of the U.S. regime on the basis of concepts of English law surely would be deemed by U.S. courts to be unreasonable and to create a conflict with U.S. law and policy. It is no wonder, therefore, that the assertion of jurisdiction by the U.S. courts here is viewed by the British Government as constituting an offensive interference with its sovereign rights and significant interests.

II. DISMISSAL OF THE SUBJECT CLAIMS IS REQUIRED BY INTERNATIONAL AND U.S. LAW

It is well established that rules of international law are part of the law of the United States, and that U.S. courts are bound to give effect to international law. *The Paquete Habana*, 175 U.S. 677, 700 (1900); *Restatement (Third) of the Foreign Relations Law of the United States* § 111 (1987) [hereinafter cited as "*Restatement (Third)*"]; Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1561-67 (1984). International law limits the authority of nations to assert jurisdiction over matters affecting the interests of other nations.

The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations. . . . The principal corollaries of the sovereignty and equality of states are: (1) a jurisdiction, *prima facie* exclusive, over a territory . . . ; (2) a duty in non-intervention in the area of exclusive jurisdiction of other states

Ian Brownlie, *Principles of Public International Law* 287 (4th ed. 1990).

In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) this Court stated that "the concept of territorial sovereignty is so deep seated, [that] any state may

resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders."

The fact that a nation has personal jurisdiction over a foreign entity by reason of that entity's business contacts is insufficient to give that nation general jurisdiction over all of the activities of the entity anywhere in the world. This is particularly the case when the extraterritorial exercise of jurisdiction would be inconsistent with the law of the nation where the foreign entity is a citizen and the challenged activity occurred.

Under international law and the principles of moderation and restraint as they have been applied in U.S. courts, the extraterritorial exercise of a U.S. court's jurisdiction to prescribe or to enforce must always be reasonable. A state "may not exercise jurisdiction" when to do so would be unreasonable, after evaluating and balancing all of the relevant factors. *Restatement (Third)* §§ 403, 431.

In recognition of the well established principles in this regard, the U.S. and U.K. Governments, as well as other Member States of the Organization for Economic Cooperation and Development ("OECD"), have agreed to avoid or minimize conflicts with foreign laws, policies or interests by following an approach of "moderation and restraint, respecting and accommodating the interests of other Member Countries." OECD, *Minimizing Conflicting Requirements: Approaches of "Moderation and Restraint"* 7 (1987). Moreover, in its recent executive agreement with the Commission of the European Communities²² the Executive Branch of the U.S. Government agreed that the important interests of the other Party "would normally be reflected in antecedent laws, decisions or statements of policy by its competent authorities."²³ Both lower courts

²² Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, 1991, 30 I.L.M. 1491.

²³ *Id.* at Art. VI(1).

have agreed that such antecedent British Government laws and policy statements exist in this case.

A. Congress Did Not Express an Intention that the FTAIA Should Apply to Conduct by Foreign Nationals in Their Home Nation Which Was for a Legitimate Business Purpose and Consistent with the Law of that Nation

The three counts of the complaints at issue here challenge conduct in the United Kingdom by British firms. The question before the Court is whether the Sherman Act, as amended by the FTAIA, applies extraterritorially in the extreme circumstances of business conduct engaged in by foreign nationals entirely outside the United States, which conduct was consistent with the laws of their home nation, a close ally of the United States, which strongly objects to the exercise of such extraterritorial jurisdiction.

The British Government urges that such an application of the FTAIA would be inconsistent with international law and comity. It further submits that this application could not have been intended by the Congress in enacting the law.

This Court has long held that "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . ." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), *Restatement (Third)* § 114.²⁴ In *Equal Employment Opportunity Commission v. Arabian American Oil*

²⁴ A Comment to § 115 of the *Restatement (Third)* explains:

It is generally assumed that Congress does not intend to repudiate an international obligation of the United States by nullifying a rule of international law. . . . The courts do not favor a repudiation of an international obligation by implication and require clear indication that Congress, in enacting legislation, intended to supersede the . . . international obligation.

Id., comment a, at 64.

Company, 111 S. Ct. 1227 (1991) ("ARAMCO"), this Court reiterated that it is a longstanding principle of American law that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States," 111 S. Ct. at 1230, quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

Among the underlying reasons cited by this Court for this long-standing principle of statutory construction was that "it serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." 111 S. Ct. at 1230. In order to avoid such discord with foreign nations, this Court stated that "we assume that Congress legislates against the backdrop of the presumption against extraterritoriality. Therefore, unless there is 'the affirmative intention of the Congress clearly expressed,' we must presume it 'is primarily concerned with domestic conditions.'" *Id.* at 1230, quoting *Benz v. Companie Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957) and *Foley Bros.*, *supra*, 336 U.S. at 285. This Court also stated in *ARAMCO* that:

[W]e have repeatedly held that even statutes that contain broad language in their definitions of "commerce" that expressly refer to "foreign commerce," do not apply abroad.

111 S. Ct. at 1232.

Indeed, in a recent speech examining this Court's *ARAMCO* decision and the FTAIA itself, the General Counsel of the U.S. Federal Trade Commission stated that:

[I]t is not clear that the jurisdictional reach of the statute [FTAIA] extends to foreign conduct undertaken by foreign nationals.

Examined in the light of the *ARAMCO* presumption, it would not appear that either the FTAIA or

the Sherman Act provides the necessary "plain statement" of Congressional intent to support its extraterritorial construction. . . . While the definition of "commerce" under both the Sherman and Federal Trade Commission Act makes specific reference to *foreign* commerce, the jurisdictional language of both statutes is indistinguishable from the sort of "boilerplate" that the Court deemed unpersuasive in *ARAMCO*, and falls short of the kind of language that the Court deemed persuasive under the Lanham Trade-Mark Act.

James M. Spears, General Counsel, Federal Trade Commission, Address Before the International Law Section of the Canadian Bar Association (September 15, 1992).

The legislative history of the FTAIA makes it clear that the purpose of the Congress was to amend the Sherman Act to promote U.S. exports by replacing inconsistent U.S. court opinions with a single, uniform standard of U.S. antitrust jurisdiction over the activities of U.S. exporters. The co-author of the legislation, Representative McClory, stated that the bill

squarely addresses the complaint voiced by American exporters and potential exporters that their actions are inhibited by uncertainty regarding the scope and effect of our antitrust laws. . . . By clarifying the law, it will especially help those small and medium-sized businesses which many are convinced have the greatest potential for making a significant contribution to the volume of our export trade.

127 Cong. Rec. H779 (daily ed. March 4, 1981). Congressman Rodino, the co-author of the bill who was the Chairman of the House Committee that reported the bill, stated:

This bill will establish that restraints on export trade only violate the Sherman Act if they have a direct and substantial effect on commerce within the United States or a domestic firm competing for foreign trade.

Id.

The FTAIA was thus intended to establish that the U.S. antitrust laws should be given relatively narrow scope in their application to the export activities of U.S. firms. The Congress cannot be deemed to have been endorsing the extraterritorial application of the U.S. antitrust laws to conduct by foreign nationals in their own country which is consistent with that country's laws.

This Court has itself never suggested that the scope of the U.S. antitrust laws should be so sweeping or insensitive to the concerns of friendly foreign governments. The last time this Court ruled directly on the issue of the extraterritorial application of the Sherman Act was in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). That case involved allegations, *inter alia*, that plaintiffs had been excluded from the Canadian market by a wholly-owned Canadian subsidiary of one of the U.S. defendants. The Canadian subsidiary acted as the exclusive purchasing agent of the Canadian Government but was allegedly operated under the control and direction of its U.S. parent, for the purpose of carrying out an overall conspiracy to monopolize the relevant industry in the United States. Defendants argued that *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), shielded them from liability, because the Court held in that case that the Sherman Act did not apply extraterritorially. In *American Banana* the Court said:

[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notion rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other State concerned justly might resent.

213 U.S. at 357 (citations omitted).

In *Continental Ore* this Court distinguished *American Banana* on the ground that

A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries.

370 U.S. at 704.

On several occasions this Court has held that U.S. and foreign corporations engaged in anticompetitive behavior partly outside and partly inside the United States are subject to jurisdiction under the Sherman Act when the challenged behavior causes an anticompetitive effect in the United States, *see, e.g., Zenith Radio Corp. v. Hazeltine*, 395 U.S. 100 (1969), and that American businesses are not free to participate in anticompetitive activity outside the United States if their conduct causes an anticompetitive effect in the United States, *see, e.g., Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 599 (1951). However, a leading treatise on this topic points out that "all foreign commerce cases since [*American Banana*] have included allegations of some acts within the territorial jurisdiction of the United States." 1 James R. Atwood & Kingman Brewster, *Antitrust and American Business Abroad* 70 (2d ed. 1981).

Nothing in any of these cases suggests that the assertion of extraterritorial jurisdiction is appropriate where foreign citizens have engaged in activity entirely outside the United States for a legitimate business purpose in a manner consistent with the laws of their own country. In its most recent relevant pronouncement, made after enactment of the FTAIA, this Court emphasized that "American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582

(1986).²⁵ In sum, this Court has never held, and there is no clearly expressed Congressional intention in the FTAIA to support the contention, that the Sherman Act applies to conduct entirely outside the United States, engaged in by foreign nationals for a legitimate business purpose and consistently with the laws of a close ally that strongly objects to the assertion of U.S. jurisdiction. Such a holding by this Court now would be inconsistent with its *ARAMCO* decision and international law and would lead to the type of "international discord" the Court has sought to avoid.

We also note that the European Court of Justice has declined to hold that merely having an effect within the European Community is a sufficient ground to assert jurisdiction. Case 89/85, *A. Ahlstrom Osakeyhtiö v. Commission*, 1988 E.C.R. 5193, 4 C.M.L.R. 901-44 (1988) ("*Wood Pulp*"). In February 1990, the Vice President of the Commission of the European Communities, who is in charge of competition issues, stated:

The learned Advocate General in the *Wood Pulp* case, Mr. Darmon, developed at length the qualifications to be attached to the notion of effects. . . . The Court did not consider the qualifications and it is in my view unreasonable to assume unqualified espousal of a doctrine in a judgment which does not mention it by name while those who urged its adoption accepted that it should be qualified. So the Court of Justice did not endorse the effects doctrine. . . .

Sir Leon Brittan, Jurisdictional Issues in EEC Competition Law, Address at the Cambridge University Hersch Lauterpacht Memorial Lectures (Feb. 8, 1990).

²⁵ In a footnote, quoting *Continental Ore*, the Court said "[t]he Sherman Act does reach conduct outside our borders, but only when the conduct has an effect on American commerce." 475 U.S. at 582 n.6.

B. The Court of Appeals Erred in Its International Comity Analysis

Even assuming that the "direct, substantial and reasonably foreseeable" effect standard of the FTAIA technically confers jurisdiction in the extreme case presented here, the court of appeals' refusal to abstain from taking jurisdiction, on the basis of international comity, was unjustified.

This Court has stressed in several contexts the need for adherence by the U.S. authorities and courts to the basic standards of international comity. See, e.g., *Société Nationale Industrielle Aérospatiale v. United States District Court*, 482 U.S. 522, 535 (1987) ("the concept of international comity requires in this context a more particularized analysis of the respective interests of the foreign nation and the requesting nation"); *Doe v. United States*, 487 U.S. 201, 218, n.16 (1988) ("we are not unaware of the international comity questions implicated by the Government's attempts to overcome protections afforded by the laws of another nation"); and *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 115 (1987) ("a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case" is required).

The British Government notes this Court's insistence that, where comity concerns are raised, the U.S. court should undertake a careful, particularized analysis of the relevant facts of the case in order to determine the reasonableness of the assertion of jurisdiction. It may well be that no single list of factors to be considered will be appropriate in every case. In any event, it is a matter for this Court to decide whether to give guidance to lower courts in the form of a non-exclusive list of factors to be included in an analysis of international comity requirements, such as the list of factors in *Timberlane* or the list suggested by Section 403 of the *Restatement (Third)*, or whether the existing general admonition to conduct a careful, particularized analysis is sufficient.

In this case, the court below failed to heed the admonition and indeed misapplied the balancing test that it had itself previously crafted in *Timberlane* and other cases. Moreover, the court of appeals' statement that "it is only in an unusual case that comity will require abstention from the exercise of jurisdiction," misconstrued the FTAIA. Such a reading of the FTAIA is unsupported and is contrary to the statute's legislative history quoted in part by the court of appeals, A 28, 938 F.2d at 932, which expressly preserved the full vitality of the *Timberlane* principle that international comity be considered:

If a court determines that the requirements for subject matter jurisdiction are met, this bill would have no effect on the courts' ability to employ notions of comity. See, e.g., *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 1287 (3d Cir. [sic: 9th Cir.] 1979 [sic: 1976]), or otherwise take account of the international character of the transactions.

H.R. Rep. No. 686, 97th Cong., 2d Sess. at 13 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News 2431, 2498.

In the FTAIA, without discussing the issues of foreign nationality and foreign government objections, Congress defined the degree of effect on U.S. commerce that is sufficient to permit a court to assert jurisdiction as one which is "direct, substantial and reasonably foreseeable." If the plaintiff fails to meet its burden of proving that the challenged conduct has such a requisite effect on U.S. commerce, the complaint must be dismissed. On the other hand, as the above-quoted legislative history clearly demonstrates, even where the requisite effect does exist, the Congress intended that the court be able to take account of the international aspects of the case consistent with the demands of international law and comity.

Under *Timberlane*, the existence of a conflict with foreign law or policy was given preeminence as a means of avoiding intrusion into the internal affairs of another

sovereign. Under the court of appeals' reformulation of *Timberlane*, however, it is unlikely that an acknowledged conflict could ever lead to judicial deference under the comity doctrine. By impairing the *Timberlane* balancing of interests test, the court of appeals' approach signals a retreat to the earlier rule of unilateral U.S. extraterritorial action which disregarded the interests of friendly foreign sovereigns.

The teaching of this Court in cases such as *ARAMCO*, *Aérospatiale*, *Doe*, and *Asahi*, that the U.S. courts must demonstrate special sensitivity to the legitimate and important interests of foreign nations, was ignored by the court of appeals. That court plainly gave inadequate weight to its own finding that the exercise of jurisdiction here would conflict with British law and policy.

Respondents have argued that there is no conflict between British and U.S. law because the British defendants do not assert that their challenged conduct was required by English law. That argument is erroneous because it attempts to impose the standards of the defense of foreign sovereign compulsion on the analysis of the international comity issue. If the British defendants could establish that their challenged conduct was compelled by the British Government, they would be entitled to dismissal on the basis of the defense of foreign sovereign compulsion long recognized by this Court, without any analysis of international comity. *Continental Ore*, *supra*, 370 U.S. at 706-07; *Société Internationale v. Rogers*, 357 U.S. 197, 211 (1958).²⁶

²⁶ For such a dismissal by a lower court see *Interamerican Refining Corp. v. Texaco Maracaibo, Inc.*, 307 F. Supp. 1291, 1298 (D. Del. 1970).

This Court, lower U.S. courts, antitrust enforcers and commentators have offered several well reasoned explanations for the existence and importance of the foreign sovereign compulsion defense that are independent of the requirements of international comity, including: fairness to private parties caught between conflicting sovereign commands; the construction of the Sherman

Timberlane I, *supra*, recognized that, even when the challenged conduct is not compelled by a foreign sovereign, international comity requires an analysis of the degree of conflict with foreign law or policy. 549 F.2d at 606-08, 614. *Timberlane II*, *supra*, mandates an inquiry into "whether the extraterritorial enforcement of United States antitrust laws creates an actual or potential conflict with the laws and policies of other countries." 749 F.2d at 1384.

The fallacy of Respondents' contention here is proven by the fact that, in *Timberlane II*, although the challenged conduct was not compelled by the Honduran Government, the court held that there was a significant conflict between U.S. antitrust law and Honduran law, and that "[t]his conflict, unless outweighed by other factors in the comity analysis, is itself a sufficient reason to decline the exercise of jurisdiction over this dispute." *Id.*

The court of appeals further erred in holding that the second *Timberlane* factor, i.e., "The nationality or allegiance of the Parties. . . ." pointed towards the exercise of jurisdiction because "the interests of Britain are at least diminished where the parties are subsidiaries of American corporations." A 29, 938 F.2d at 933. This holding is contrary to well established principles of international and U.S. law which provide that, regardless of its ownership, a corporation is a national of the country under the laws of which it is organized. See, e.g., *Sumitomo Shoji Am., Inc. v. Aragliano*, 457 U.S. 176, 185 n.11 (1982); *Barcelona Traction (Belgium v. Spain)*, [1970] I.C.J. 3; *Restatement (Third)* § 213. Unlike *Continental Ore*, *supra*, the U.S. parent companies are not named in the complaints here and the

Act; judicial noninterference in the Executive Branch's conduct of international relations; and the concept that conduct compelled by a foreign sovereign should be deemed an act of the sovereign itself. See, e.g., *Restatement (Third)* § 441; Antitrust Division, U.S. Dep't of Justice, *Antitrust Enforcement Guidelines for International Operations* 33-34 (1988).

complaints do not allege that those parents were involved in the challenged conduct. Moreover, certain of the British defendants, and all Petitioners here, have no American parents, subsidiaries or affiliates.

Finally, the court of appeals also erred by not considering the seventh *Timberlane* factor, i.e., "the relative importance to the violations charged of conduct within the United States, as compared with conduct abroad." 549 F.2d 614. The district court held that, as to two of the three claims at issue here (the Sixth and Eighth), no challenged conduct was alleged to have occurred within the United States. It also held that the alleged conduct in the United States relating to the remaining claim relevant here (the Fifth) was incidental to alleged agreements in London among the defendants. A 77, 723 F. Supp. at 490. The unexplained failure of the court of appeals to consider the seventh *Timberlane* factor obviously negates its holding that only the conceded conflict with British law weighed in favor of abstention from exercising jurisdiction.

In sum, in the view of the British Government, it is important for this and future cases that the decision of the court below, unjustifiably extending the extraterritorial reach of the U.S. antitrust laws, should be reversed.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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